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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Amendment to the Commission's
Rules Regarding a Plan for
Sharing the Costs of Microwave
Relocation

)
) WT Docket No. 95-157
) RM-8643
)
)

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS

Western Wireless Corporation ("WWC"), by its attorneys, hereby respectfully submits its Comments in response to the captioned First Report and Order and Further Notice of Proposed Rulemaking, FCC 95-426 ("FNPRM") in the above-referenced proceeding, released by the Commission on April 30, 1996.

I. INTRODUCTORY STATEMENT

WWC, through its subsidiaries, owns and operates high quality cellular systems in 15 western states, with a focus on Rural Service Areas ("RSAs") and small Metropolitan Statistical Areas ("MSAs"). WWC currently serves over 70 cellular markets including nearly 6 million pops. WWC also was the high bidder for, and purchased A block licenses for six MTAs in the broadband PCS auction, and has contracted to purchase the B block license for a seventh MTA. In February 1996, WWC completed initial construction and commenced commercial operations of its PCS system in the Honolulu MTA, which thus became the first auction awarded broadband PCS market to begin commercial operations. WWC holds a 49.9 percent interest in a limited partnership that was the high bidder for 13 C block licenses.

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II. COMMENTS

A. The FCC Must Clarify the Involuntary Relocation Process

On April 15, 1996, a number of PCS licensees, including WWC, submitted an ex parte letter to the FCC, urging it to clarify certain aspects of its involuntary relocation procedures.^{1/} Specifically, the parties requested that the FCC "clarify that the end of the mandatory period is not the start of a third negotiation period." Id. While the FCC declined in the FNRPM to address the issues raised in the April 15 letter for procedural reasons,^{2/} it found the letter had raised legitimate issues regarding the procedures for implementing involuntary relocation at the conclusion of the mandatory negotiation period. FNRPM at 26, para. 52. WWC again encourages the FCC to clarify certain aspects of its involuntary relocation procedure.

When a microwave incumbent and a PCS licensee fail to reach agreement about relocation during either the voluntary or mandatory negotiation periods, the PCS licensee may request involuntary relocation of the microwave facility. In doing so, the PCS licensee must guarantee payment of all costs of relocation to a comparable facility; complete all activities for placing the new facilities into operation; and build and test the new system.

^{1/} Letter from AT&T Wireless Services, Inc., BellSouth Personal Mobile Communications, DCR Communications, GTE Mobilenet, Pacific Bell Mobile Services, PCS Primeco, L.P. and WWC to Michele Farquhar, Chief, Wireless Telecommunications Bureau, April 15, 1996 ("April 15 letter").

^{2/} The FCC stated that the issues raised in the letter were not included in the Notice of Proposed Rulemaking (Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation), 11 FCC Rcd 1923 (1995).

FNPRM at 4, para. 5; 47 C.F.R. §94.59. However, the vagaries of the relocation procedure make it possible for incumbents to extend the relocation process long past the expiration of the mandatory negotiation period. The rules do not specify whether the incumbent and the PCS licensee must agree on what constitutes a comparable replacement system, or on the costs of the system. Furthermore, there is no time limit on when the parties must reach agreement on these points, permitting an incumbent to delay relocations by its continued refusal to accept replacement facilities. This uncertainty could also create incentives for some incumbents to fail to bargain in good faith (despite the Commission's mandate for such) throughout the mandatory negotiation period, knowing that they can continue to negotiate past its expiration.

As it so stated in the April 15 letter, Western requests that the FCC clarify that even if a relocation agreement is not reached during the voluntary or mandatory negotiation period, an incumbent should still be required to complete the relocation process and vacate the 2 GHz frequencies by the end of the mandatory negotiation period. In the alternative, incumbents should be converted to secondary status at the end of the mandatory negotiation period. Such clarification is in the public interest because: (1) it would not place an additional burden on incumbents, because they are already aware that they are going to have to relocate at some time; (2) incumbents would have an incentive to negotiate early for comparable systems; (3) PCS licensees would have a date certain by which they could deploy their PCS systems;

- (4) it would ease the burden on the FCC to resolve disputes; and
- (5) service to the public would be expedited.

B. The FCC Should Revise the Length of the Voluntary and Mandatory Negotiation Periods for the C, D, E and F Blocks

In the FNPRM, the FCC asks whether it should shorten the voluntary negotiation period to one year (two years for public safety entities) and lengthen the mandatory negotiation period to two years (three years for public safety entities) for the C, D, E and F blocks. FNPRM at 45, para. 96. WWC strongly urges adoption of this proposal for all unlicensed PCS blocks, including block C. Such action would assist all later PCS licensees equally in minimizing the problems that the A and B block licensees encountered with intractable incumbents viewing the relocation process as their opportunity to gain a windfall in the form of free system upgrades or found money. "The voluntary negotiation period for the C block has not yet commenced, so unlike [the] A and B blocks, there are no ongoing negotiations currently taking place in reliance on the current rules." FNPRM at 45, para. 97. Thus, there is no reason to treat the C block licensees differently than licensees in the D, E and F blocks. If the FCC changes the negotiation schedule, it must do so for all remaining PCS license blocks.

Despite the exhortation of many commenters in this proceeding to the contrary, the FCC has made it clear that microwave incumbents are not required to negotiate during the voluntary period. FNPRM at 6, para. 10. Thus, an incumbent may refuse to negotiate until the mandatory negotiation period begins. As the

FCC has been made aware, some "incumbents are abusing the relocation process by demanding large premium payments or refusing to negotiate" FNPRM at 7, para. 11.^{3/} Such refusal delays both the inevitable relocation of its facilities and the provision of PCS service to the public. Shortening the voluntary period to one year will force an unwilling microwave incumbent to come to the negotiation table in half the time, leading to more rapid relocation, and thus furthering the FCC's desire for expeditious PCS deployment.

C. Microwave Incumbents Should Not Be Eligible to Participate in the Cost-Sharing Plan

The FCC tentatively concluded that "microwave incumbents that relocate themselves should be allowed to obtain reimbursement rights and collect reimbursement under the cost-sharing plan from later-entrant PCS licensees that would have interfered with the relocated link." FNPRM at 46, para. 99. WWC strongly urges the FCC not to adopt this proposal.

^{3/} For example, WWC had reached an impasse in one of its PCS markets with the final affected incumbent pertaining to a critical portion of its service area. WWC had been unable to frequency plan around this incumbent. With numerous base stations leased and under construction, roaming agreements signed, a switch in place, and many other long-term commitments on its books, it was one incumbent's refusal to negotiate that prevented WWC from providing PCS service. Moreover, construction of that PCS site was stalled until that incumbent agreed to negotiate. The incumbent hinted that it wanted every PCS licensee affecting any of its multi-MTA microwave network to agree, as a group, to provide a full system switchout (all analog to all digital) before it would be willing to move even one link. Ironically, it was only one link that caused the problem. Relocating that link from 2 GHz analog to 6 GHz analog (which is, in fact, a comparable relocation under the rules) could have been accomplished in a matter of weeks. Instead, because of the current rules, the incumbent was able to parlay its desire for a new microwave system into serious delays in the initiation of PCS service to the public.

The FCC itself stated in the FNPRM that it "question[s] whether a large number of incumbents would avail themselves of such an option, given that [its] rules require PCS licensees to pay for the entire cost of providing incumbents with comparable facilities." FNPRM at 46, para. 99. Experience from the A and B block negotiations shows that incumbents often get more than the \$250,000 cap on reimbursable costs. It is contrary to common sense to think that if there is potential to get more than \$250,000, an incumbent will relocate itself and limit itself to reimbursement of \$250,000. The high bid prices in the C block auction demonstrate the increasing capital investment in, and higher deemed values of, PCS systems. Thus, it is reasonable to assume that PCS licensees would be willing to continue to pay such relocation premiums at current or even higher levels. This demonstrates that strong incentives remain for incumbents to wait for PCS licenses to relocate their facilities.

The FCC also indicated its concern as to "how subsequent PCS licensees could be protected from being required to pay a larger amount to an incumbent that relocates itself than to another PCS licensee who has an incentive to minimize expenses." FNPRM at 46, para. 99. The current two party negotiation process inherently protects the incumbent while minimizing relocation costs. A unilateral procedure whereby the incumbent is relied upon to use good faith to keep costs down, where the natural incentive is solely to enhance its own situation, would be a poor substitute for an arms' length negotiation. Instead of being used to facilitate system-wide relocation as intended, certain incumbents will use

this one-sided process solely for their own advantage. The inevitable result will be disputes and the inequitable shifting of costs for system upgrades to PCS licensees. On the whole, such a change would only complicate and impede the progress of relocations, and thus slow deployment of PCS systems.

A further problem arising from the proposed option is that PCS licensees could be required to pay to relocate microwave links in cases where there would be no interference to trigger the relocation obligation in the first place. This situation arises because the measures of interference for relocation, on the one hand, and cost-sharing, on the other hand, are different.^{4/} For example, a D block licensee might best serve its market by locating a PCS site at a certain point that falls within the cost sharing rectangle defined by existing microwave links, even though the PCS licensee is able to engineer around the incumbent and thus not interfere with those links. If the incumbent had not relocated the link on its own (and assuming that no earlier licensee had relocated the link), the PCS licensee would not be liable for any relocation costs. Thus, an incumbent could impose an obligation on a PCS licensee where there is no interference, adding to its PCS build-out costs or incenting the licensee to re-engineer the system and compromise service. Either way, the public loses. This result

^{4/} Pursuant to Sections 24.237 and 24.239, a PCS licensee is obligated to relocate an incumbent's link if it would cause interference determined pursuant to the criteria set forth in TIA Telecommunications Systems Bulletin 10-F or some other industry accepted standard. 47 C.F.R. §§24.237, 24.239. The cost-sharing obligation is determined on the basis of the "proximity threshold" test. 47 C.F.R. §24.247.

thwarts the fundamental grounding of the relocation concept in industry accepted standards of interference.

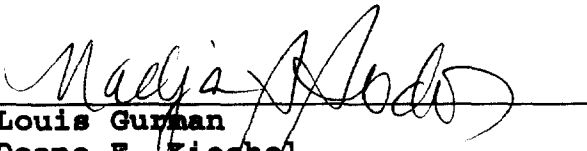
III. CONCLUSION

WWC has urged throughout this proceeding that the FCC must adopt rules that encourage efficient and expeditious microwave relocation and an equitable allocation of costs. Adoption of the proposals advocated above will promote these objective by facilitating negotiations, speeding relocations should negotiations fail and insuring that disproportionate relocation costs are not shifted to PCS licensees. Thus, WWC submits that adoption of these proposals is in the public interest.

Respectfully submitted,

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